No. 79447-7-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

S. MICHAEL KUNATH, *et al.*,

Respondents,

v.

CITY OF SEATTLE, *et al.*,

Appellants.

REPLY ON MOTION OF LEVINE AND BURKE RESPONDENTS FOR RECONSIDERATION

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A. INTRODUCTION

Pursuant to this Court's October 4, 2019 ruling, the *Levine/Burke* respondents provide this reply on their motion for reconsideration. The City of Seattle ("City") does not have authority under RCW 35.22.280(2) to tax income because income is "intangible personal property" exempt from property taxation under RCW 84.36.070. And, notwithstanding the rhetorical smoke screens thrown up by the City and the Economic Opportunity Institute ("EOI"), this Court's analysis of SSB 4313 under article II, § 19 started from a flawed premise—in fact, the legislative history of a bill *is* critical to the constitutional single-subject analysis.

This Court should reconsider its opinion and hear further argument in the case.

B. REPLY ARGUMENT WHY THIS COURT SHOULD RECONSIDER ITS OPINION

(1) The Court Misinterpreted the City's Statutory Authority to Tax Income as a Property Tax

In *sua sponte* holding that an income tax is a property tax authorized by RCW 35.22.280(2), the Court recognized that the City never "argued for the applicability of the statute" because it contended "that the income tax is not a property tax at all." Op. at 12 n.58. Consequently, the parties never briefed the statutory limitations on property taxes, including the scope of RCW 84.36.070's prohibition against taxes on "intangible

personal property." As the *Levine/Burke* respondents explained in their motion, in 1997, the Legislature amended RCW 84.36.070 from prohibiting taxes on specific items to prohibiting taxes on all intangible personal property—more than 60 years after *Jenson* and in no way "incongruous" with the income tax struck down in that case. Motion at 3-5. Neither the City nor EOI dispute that relevant legislative history.

Rather, the City asks the Court to "narrowly" construe RCW 84.36.070, claiming the statute only prohibits property taxes on "certain types of personal assets." City Ans. at 7. EOI similarly mischaracterizes the statue as prohibiting taxes only on "*certain* intangible personal property," which it asserts is limited to "three categories" of intangible personal property. EOI Ans. at 10 (emphasis added). Wrong. "Where statutory language is plain and unambiguous courts will not construe the statute but will glean the legislative intent from the words of the statute itself." *Agrlilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). Here, the language is plain and unambiguous.

Prior to 1997, RCW 84.36.070 stated that "[t]he following property" was exempt from property taxes—listing specific types of intangible personal property. The 1997 amendment struck the phrase "the following property" and replaced it with "intangible personal property," while also replacing a colon with a period, so that the opening sentence

was changed to: "~~The following~~ Intangible personal property ~~shall be~~ is exempt from ad valorem taxation~~:~~." The amendment defined intangible personal property to include the items previously exempt plus all "other intangible personal property." At the same time, the amendment excluded from the definition things that have "characteristics or attributes" of real or tangible personal property such as zoning, location, view, geographical features, easements, *etc.* Laws of 1997, ch. 181 § 1.

Property taxes can be imposed on real and personal property. Title 84 RCW. Plainly, income is not real property. And there are only two types of personal property: tangible and intangible. *See* WAC 458-12-005 (Personal property "falls into two categories; namely, *tangible* personal property, that is to say, things which have a physical existence, and *intangible* personal property which consists of rights and privileges having a legal but not a physical existence.") (emphasis in original). Income is not tangible personal property; it does not have a physical existence. In fact, it is precisely because income is neither real property nor tangible personal property that our Supreme Court unequivocally held that "incomes necessarily fall within the category of intangible property." *Culliton v. Chase*, 174 Wash. 363, 374, 25 P.2d 81 (1933).

Income therefore falls squarely within RCW 84.36.070's exemption for "intangible personal property." There is no merit to the

City's argument that the statute is inapplicable because it does not list "income" or things of "the same kind." As discussed above, following the 1997 amendment, RCW 84.36.070 defines intangible personal property by reference to certain items, but it also unambiguously exempts all "other intangible personal property." RCW 84.36.070(1) & (2)(c). The items are listed by way of example, not limitation. WAC 458-50-150(1) ("the legislature expanded the property tax exemption for intangible personal property and provided examples of exempt property."); *see also,* Final Bill Report, SB 5286, 55th Leg., Reg. Sess. (1997) ("All intangible personal property is exempt from property tax. Intangible personal property includes, but is not limited to, the items exempt under current law ....").

If RCW 84.36.070's exemption only applies to the listed examples or their equivalents, then the statute's broad, catch-all provision for "other intangible personal property" would be rendered meaningless, contrary to well-settled rules of statutory construction. *See Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). That flawed interpretation also would render meaningless that portion of RCW 84.36.070 that lists items specifically excluded from the definition of "intangible personal property." RCW 84.36.070(3). If the Legislature truly wanted to exempt income from property taxation, that is where it would have said so—but it didn't because income does not bear the

"characteristics or attributes" of real or tangible personal property. At bottom, the City's argument avoids the relevant question: if income is not "intangible personal property" exempt from taxation under RCW 84.36.070, then what kind of property is it? The City never says.

This Court can also reject the City's claim that RCW 84.36.070's reference to "*ad valorem*" taxes means it does not apply to an income tax. Here, too, the City ignores basic Washington tax law. Municipalities have authority to levy only two types of taxes: excise taxes and property taxes. *Harbour Village Apartments v. City of Mukilteo*, 139 Wn.2d 604, 607, 989 P.2d 542 (1999); *Whatcom County v. Taxpayers of Whatcom County Solid Waste Disposal Dist.*, 66 Wn. App. 284, 289, 831 P.2d 1140 (1992). And, if it is a property tax, then by definition, it is an "ad valorem" tax—which is the *only* statutorily authorized means by which municipalities may tax property. *See* Title 84 RCW; *Belas v. Kiga*, 135 Wn.2d 913, 922, 959 P.2d 1037 (1998) ("The principle underlying the property tax system is that it is an ad valorem tax, meaning the tax is based on property value.").

The City complains that the procedures set forth in Title 84 RCW "make little sense" when applied to an income tax. City Ans. at 10. That is true, but only because the Legislature intended to exempt all intangible personal property, such as income, from property taxation. In any event, the City can't have it both ways. If income is not exempt intangible

personal property under RCW 84.36.070, then it *must* be taxed on an *ad valorem* basis pursuant to Title 84 RCW—which is, after all, the *only* statutorily authorized means of imposing a property tax. In the end, the admitted fact that the City's income tax ordinance does not comply with the assessment and levy procedures in Title 84 RCW is just another reason why its income tax exceeds the City's statutory taxing authority.

Finally, EOI argues that if RCW 84.36.070 applied to income it would be "inconsistent with the Legislature's B&O tax." EOI Ans. at 12. But there is no conflict because RCW 84.36.070 exempts intangibles from *property tax*, whereas the B&O tax is an *excise tax*. *City of Seattle v. Paschen Contractors, Inc.*, 111 Wn.2d 54, 57, 758 P.2d 975 (1988) ("B&O tax is an excise tax imposed upon the act or privilege of engaging in business activities"). RCW 35.22.280(32), not RCW 35.22.280(2), authorizes excise taxes, *see Watson v. City of Seattle*, 189 Wn.2d 149, 167-68, 401 P.3d 1 (2017)—but this Court properly refused to rely on that statute as authority for the City's income tax. Op. at 6-8; *also id.* at 15 ("we decline Seattle's invitation to offer an advisory opinion on whether an income tax should be analyzed as an excise tax"). In short, exempting income from the city's property tax authority as "intangible personal property" has no relevance to or impact on its excise tax authority over business activities.

This Court should reconsider its opinion as to RCW 35.22.280(2).

(2) The Court Employed a Flawed Analytical Approach to Article II, § 19

Nowhere in its answer to the *Levine/Burke* respondents' motion for reconsideration does the City take issue with their analysis of the origin of article II, § 19, Motion at 7-8, or the fact that in analyzing "rational unity" in a multi-topic bill, this Court erroneously declined to analyze the legislative history of SSB 4313 because it was "extrinsic evidence" to the legislation itself. The City, in fact, *concedes* the point because it states in its answer at 12-13 that the "applicable single subject test is well-established," citing *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 278 P.3d 632 (2012) ("*WSAVP*") and *Lee v. State*, 185 Wn.2d 608, 374 P.3d 157 (2016). Both of those cases are cited by the *Levine/Burke* respondents for the explicit proposition that legislative history *must* be considered in determining if the contents of a bill are rationally related to each other. *See* Motion at 10-12.

EOI stubbornly insists that under *Citizens for Responsible Wildlife Management v. State*, 149 Wn.2d 622, 71 P.3d 644 (2003), this Court must look only at the legislation itself. EOI Ans. at 4. EOI neglects to address the *Levine/Burke* respondents' argument that the *Citizens* court found legislative history to be unhelpful because it consisted of legislative

hearing testimony that postdated the enactment of the initiative measure at issue there—*not* that legislative history cannot be considered by Washington courts. Motion at 9. In addition, EOI fails to even analyze the Supreme Court's later decisions in *WSAVP* or *Lee*, a fact that by itself should call into question EOI's analysis of article II, § 19. It had an obligation to fully analyze *all* authority, good and bad, for this Court to consider. RPC 3.3(a)(3).

Moreover, from a simple practical viewpoint, how can a court determine if there was a rational unity among sections of a bill, without knowing the bill's legislative history? No court can discern if "logrolling" came into play in the enactment of a bill without assessing how the bill's contents came together, i.e., whether the contents started as separate bills, whether the contents appeared suddenly in the legislative process as an amendment, whether an expansive bill appeared after conference committee consideration, *etc.* It was precisely for this reason that our Supreme Court upheld the 1981 Tort Reform Act in *Scott v. Cascade Structures,* 100 Wn.2d 537, 545-46, 673 P.2d 179 (1983), a case neither the City nor EOI addresses. Although the 1981 legislation addressed a variety of topics—contribution among tortfeasors, comparative fault, and substantive product liability law, to name just a few—the Legislature had historically addressed the varied topics together, a study committee

addressed them together, and the varied topics were considered in an omnibus bill from the initial introduction of the legislation and throughout the legislative process. *Id.*[1]

Both the City and EOI contend that the income tax ban was not germane to the rest of SSB 4313. City Ans. at 12-19; EOI Ans. at 2-9. They are wrong, particularly where they ignore the Legislature's unusual process for considering the issues addressed in that bill.

The *Levine/Burke* respondents detailed in their motion at 12-14 the unique factual circumstances under which SSB 4313 came to be introduced and considered by the Legislature. It is *undisputed* that:

- prompted by renewed interest in a city-county form of government in the early 1980's after state voters adopted the 58th Amendment, and Attorney General Opinions raising questions about the implementation of such a form of government, the Legislature decided it needed to enact clarifying legislation;
- the Legislature enacted SHCR 2 to implement a study of the city-county form of government;
- the respective local government committees of the State House and Senate conducted such a public study;
- the study group developed a draft bill that included the section that became RCW 36.65.030;

[1] Similarly, neither the City nor EOI address *Fritz v. Gorton,* 83 Wn.2d 275, 517 P.2d 911 (1974) where our Supreme Court rejected a challenge to Initiative 276 on article II, § 19 grounds. That measure contained campaign contribution reporting and limits, lobbyist registration, and many other disparate topics. Merely because the legislating body chooses to address issues in an omnibus fashion does not violate rational unity, as the City and EOI imply.

- that section was in the bill in public hearings in both houses and in its final version;

- the staff for the Senate Local Government Committee specifically told legislators that in order to ban authority for city-county combined governments to levy income taxes, the authority had to be more broadly applied to all general-purpose local governments.[2]

Both answers *ignore* this legislative process. The enactment of a concurrent resolution directing the conduct of a study is a very *public* step. It is not common in the legislative process. Both answers ignore the HCR.

If the purposes of article II, § 19 are transparency and the avoidance of logrolling,[3] *both* goals are met in the enactment of SSB 4313. The legislative process for the bill was completely transparent: an HCR, a study committee that did its work in public, public hearings, and public votes on the bill in both houses. *Nothing* was hidden.

As for logrolling, it simply did not occur in connection with

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[2] The December 2, 1983 Senate Local Government Committee staff memorandum stated:

> Sec. 3. Tax on Net Income – Prohibits a city-county from levying a tax on net income. Note: This section also includes cities and counties because there can be no legislative prohibition or restriction on a city-county unless such prohibition or restriction applies equally to every other city, county, and city-county.

See Appendix to *Levine/Burke* Motion. Conspicuously, neither EOI nor the City chose to address this critical point.

[3] EOI indirectly chides the *Levine/Burke* respondents for focusing too much on logrolling in their motion. EOI Ans. at 6-7. However, the City asserts that the degree of transparency in the enactment of a bill has no bearing on rational unity. City Ans. at 16-17. Regardless, the *Levine/Burke* respondents noted both purposes to article II, § 19 in their motion at 7-8.

SSB 4313. The legislative process was the antithesis of logrolling. The provision codified as RCW 36.65.030 was part of the bill throughout the legislative process. It was not a separate bill later married to another to garner votes. It was not a last-minute surprise floor amendment or addition to a conference committee recommendation. No trading of votes was involved.

Rational unity was plainly satisfied here. RCW 36.65.030 was *always* a very public part of the SHCR 2 study that became SSB 4313. It was germane to the other aspects of legislation dealing with the implementation of city-county governments.

This Court should reconsider its opinion as to article II, § 19.

C. CONCLUSION

Nothing offered in the answers of the City/EOI should deter this Court from granting reconsideration of its opinion. In fact, those answers only confirm that reconsideration is appropriate. The *Levine/Burke* respondents believe that re-argument on the issues raised herein is appropriate.

DATED this 18th day of October, 2019.

Respectfully submitted,

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DECLARATION OF SERVICE

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 18, 2019 at Seattle, Washington.

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